BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JED M. FRAKER	)	
Claimant	)	
	)	
VS.	)	
	)	
CATES HEATING & AIR CONDITIONING	)	
Respondent	)	Docket No. 1,028,955
	)	
AND	)	
	)	
NATIONWIDE MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the July 10, 2006, preliminary hearing Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

Following a June 29, 2006, preliminary hearing, the Administrative Law Judge (ALJ) ordered the parties to select a neutral physician for the purpose of determining causation and making recommendations for any further medical treatment.

Respondent argues that "Judge Foerschler, from all indication, found this claim compensable"[1] and that the ALJ's order constitutes a finding that claimant suffered personal injury by accident arising out of and in the course of his employment and that claimant provided timely notice. Respondent alleges that this was error as "the uncontroverted evidence establishes that it is more probably true than not true that claimant did not suffer work-related injury as alleged. The uncontroverted evidence also establishes lack of timely notice."[2]

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[1] Appeal Brief of Respondent, Cates Service Co., and Its Insurance Carrier, Nationwide Mutual Insurance Company, filed August 14, 2006, at 1.

[2] *Id.* at 1-2.

Claimant contends that his testimony is sufficient to support the ALJ's preliminary decision and asks that the Board affirm the same. Further, claimant asks that the initial chart entry from the medical records of Dr. C. M. Striebinger of May 4, 2006, which was mailed and faxed to the ALJ and respondent's counsel on July 7, 2006, be accepted into evidence and considered as part of the record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant started working for respondent in 1983 doing service work. In 1990, he started working in residential equipment sales. As a part of his job, he was issued a minivan by respondent. On January 17, 2006, claimant pulled into the automatic car wash at JB's One Stop (JB's). Since it was winter, the exit door on the car wash was closed. When the automatic car wash stopped, the exit door opened a few feet but stuck about chest high. Claimant got out of his vehicle and tried to lift up the door. Although the door was very heavy, he lifted it about a foot. However, he was afraid of breaking off his antenna, so he asked an unknown car wash customer to hold up the door as he adjusted the antenna. At that time, the door was lifted to about the level of the windshield, and the unknown customer suggested claimant drive the van on through the door because he thought the door would go up far enough that he could get out. Claimant then exited the wash bay and drove the minivan back to respondent's place of business.

When claimant got home that evening, he noticed immediately that a set of brake lights that had been attached to the top of the minivan had been torn off. He called Jim Briuer, who owns JB's, and reported the malfunctioning door and the broken brake lights. He then called Roger Rehies, another employee of respondent who lived close to JB's, and asked him to retrieve the brake lights.

As claimant was driving home that evening, he started having back pain and pain down his left leg. He used an ice pack and took some Advil. When he went to work the next day, he visited with his boss, Jeff Kiekel, and Mr. Rehies about the problem with the car wash door. Mr. Rehies said that he and Mr. Briuer tried to fix the door but were unable to and thought there was a hydraulic problem. Claimant said that at that time he told Mr. Kiekel and Mr. Rehies that he had to lift the door and that his back was hurting him.

Claimant continued to work after the incident. A few days after the incident he called Dr. C.M. Striebinger. Dr. Striebinger's nurse scheduled him for an MRI, which was done on January 30, 2006. Claimant said he needed to miss work to have the MRI done and that he advised Mr. Kiekel that he was having the test run.

After the results of the MRI came back, claimant received a call from Dr. Striebinger's office suggesting that he have epidurals done. Because he had bad results with epidurals in the past and because at that time he was feeling better, he declined that treatment. The first time claimant actually saw Dr. Striebinger in person after the January 2006 accident was in May 2006. He said that Dr. Striebinger examined his back, reviewed the results of the MRI, and told him that he should not do any physically demanding work. Dr. Striebinger recommended physical therapy, but by that time claimant had left his employment at respondent and had no insurance. Dr. Striebinger told him to continue with ice packs and Advil. Claimant has seen Dr. Striebinger only that one time since the accident in January 2006.

Claimant testified that Dr. Striebinger had performed back surgery on him in October 2005 for neurological problems on his left side. However, he stated he was completely free of pain after his October 2005 surgery until the incident in January 2006.

Claimant continued to work through February, March, and April and was receiving no treatment for his back. At the end or March or beginning of April, claimant noticed that, without warning, his weekly income had been cut by respondent. Claimant continued to work until the end of April. When his weekly income continued to be cut, he left his employment with respondent.

At the preliminary hearing held on June 29, 2006, claimant admitted that he did not have a medical report or office note from Dr. Striebinger that indicated that he hurt his back while lifting up the door at the car wash. However, in a letter sent to the ALJ on July 7, 2006, claimant's attorney attached the office record of Dr. Striebinger dated May 4, 2006, which states in part:

> [Claimant] injured himself trying to lift a garage door at a car wash apparently in January 2006. Subsequently he began having some pain in the left leg again, down to the back of the knee, the more active he became the worse the pain became.

Respondent sent claimant to Dr. Michael J. Geist for an independent medical examination that was performed on June 20, 2006. At that time, claimant described having low back pain which he related to a work-related accident on January 17, 2006. Dr. Geist described this pain as an exacerbation of claimant's previous back history and injuries and surgeries. He also stated that claimant would benefit from a course of physical therapy, weight loss, a home exercise program, and over-the-counter medications. "If I was asked to become the treating physician, then again I would recommend several weeks of physical therapy and recheck after that."[3]

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[3] P.H. Trans. (June 29, 2006), Resp. Ex. A at 4.

Mr. Kiekel is vice president of respondent and was claimant's only supervisor. He testified that claimant never told him that he had injured his back lifting a garage door in January 2006. He stated that the first he knew that claimant was suffering from a work-related accident was in May 2006 when he received a letter from claimant's attorney. He denied knowing that claimant had an MRI.

Mr. Kiekel indicated that he knew that the brake lights of the van had been knocked off at the car wash but said that claimant only told him that he drove underneath the open door, the door was not high enough, and the light was broken off when claimant drove through the door opening.

Mr. Rehies was a coworker of claimant at respondent. He testified that claimant had never made a comment to him about hurting his back lifting a door at the car wash at JB's. Claimant did call him in January 2006 and asked him to retrieve a broken light from JB's. When Mr. Rehies got to the car wash, he and Mr. Briuer inspected the door, which was stuck open a little above Mr. Rehies' head. Mr. Rehies told Mr. Briuer that the garage door was frozen and would not move.

Mr. Briuer testified that he had not received a call from claimant about the door to the car wash and the first he knew there was a problem was when Mr. Rehies called to ask about the broken light. He and Mr. Rehies checked out the door at the car wash, and it was stuck open. Mr. Briuer testified that he did not think claimant would have been able to lift the door up. Mr. Briuer also said that if claimant was in the wash bay washing his vehicle, both doors to the car wash would have been closed and another customer would not have been able to get into the bay.

Before reaching the merits of respondent's appeal as to the compensability of this claim, the Board must first determine whether it has jurisdiction to review the ALJ's order. The ALJ's July 10, 2006, Preliminary Decision does not award claimant the authorized medical treatment he requests. Rather, it orders an independent medical examination (IME) to be conducted by a neutral physician. As such, it is an interlocutory order, not an award of compensation. The ALJ's order states that the IME is for an opinion on causation and for treatment recommendations. It is apparent that the ALJ has not ruled on the compensability of this claim. Accordingly, this appeal is premature. The Board is without jurisdiction to review the ALJ's interlocutory order.

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal from the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated July 10, 2006, should be and is hereby dismissed.

IT IS SO ORDERED.

Dated this _____ day of October, 2006.

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BOARD MEMBER

c: David R. Hills, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge